

Care Center of America, Inc. d/b/a Life Care Center of Plainwell and Local No. 79, Service Employees' International Union, AFL-CIO. Case 7-CA-43102

October 26, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

Pursuant to a charge filed on June 2, 2000, the General Counsel of the National Labor Relations Board issued a complaint on June 12, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Cases 7-RC-21626 and 7-RC-21627. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On July 6, 2000, the General Counsel filed a Motion for Summary Judgment. On July 7, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the underlying representation proceeding.

To the extent that the Respondent argues, as it did in the underlying certification case, that charge nurses included in the unit are supervisors under the decisions of certain courts of appeals, we note that the Supreme Court has recently granted certiorari to resolve the conflict in the circuits over the meaning of the term "independent judgment" in Section 2(11), as well as the issue of which party has the burden of proof in establishing supervisory status. *NLRB v. Kentucky River Community Care*, 2000 WL 655750 (2000).

Resolution of those issues will directly resolve the question whether the Regional Director applied a reasonable legal standard in determining that the nurses' routine exercise of professional or technical judgment in directing aides in delivering services in accordance with patient care plans did not make them supervisors. In our judgment, resolution of those issues also bears on the Respondent's contention that the nurses have 2(11) authority to send aides home for extreme and flagrant violations of its rules. For example, resolution of the

lations of its rules. For example, resolution of the independent judgment issue bears on the question whether the authority of charge nurses to remove an abusive aide from a patient's room or to eject a drunk or insubordinate aide from the facility requires independent judgment where those actions are mandated by law or by the Respondent's clear policy. Cf. *Capital Transit Co.*, 114 NLRB 617, 626, 628 (1950) (independent judgment not required where detailed rules leave no room for discretion).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times the Respondent, a corporation, with an office and places of business in Plainwell, Michigan, has been engaged in the operation of a nursing home. During the calendar year ending December 31, 1999, the Respondent in the course and conduct of its business operations received gross revenue in excess of \$100,000 and purchased and received at its Plainwell facility goods valued in excess of \$5000 from other enterprises located within the State of Michigan which had received these goods from points located outside the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held October 22, 1999, the Union was certified on January 7, 2000, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aids, laundry aides, maintenance employees, dietary

aides, cooks, assistant social directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses, registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by the Respondent at its facility located at 320 Brigham, Plainwell, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since March 6, 2000, the Respondent has refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit.¹ We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 6, 2000, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert.*

¹ Although the complaint does not allege that the Union requested bargaining, the Respondent does not argue that there can be no refusal to bargain in the absence of a union request. In any event, on the facts of this case, such a contention would lack merit. On March 6, 2000, the Respondent's executive director sent a letter to the Union's representative which stated unequivocally: "Please be advised that Life Care Center of Plainwell has decided to test the certification of the National Labor Relations Board. We therefore decline to recognize and bargain with S.E.I.U. Local 79." Because it is apparent that "after the receipt of Respondent's letter, a specific request demand for bargaining would have been futile, such a request to bargain is not a prerequisite to the finding of an 8(a)(5) violation." *Richardson Chemical Co.*, 222 NLRB 5, 6 (1976); accord: *Fairleigh Dickinson University*, 253 NLRB 1049, 1050 (1981).

denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Life Care Center of America, Inc. d/b/a Life Care Center of Plainwell, Plainwell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local No. 79, Service Employees' International Union, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aids, laundry aides, maintenance employees, dietary aides, cooks, assistant social directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses, registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by the Respondent at its facility located at 320 Brigham, Plainwell, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Plainwell, Michigan, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 6, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local No. 79, Service Employees' International Union, AFL-CIO as

the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aids, laundry aides, maintenance employees, dietary aides, cooks, assistant social directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses, registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by us at our facility located at 320 Brigham, Plainwell, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

CARE CENTER OF AMERICA, INC. LIFE
CARE CENTER OF AMERICA, INC.